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CITATIONS

609334—61——1

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (Appendix, *infra*, pp. 20–38) has not yet been reported. The prior opinion of the district court, and the opinion of this Court when this case was previously before it, are reported, respectively, in 111 F. Supp. 562 and 347 U.S. 514.

JURISDICTION

This suit was originally brought under § 4 of the Sherman Act, 15 U.S.C. 4 and § 15 of the Clayton Act, 15 U.S.C. 25. The final judgment of the district court was entered on February 27, 1961 (App., *infra*, p. 38), and the notice of appeal was filed on April 28, 1961. The jurisdiction of this court is conferred

by § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended. *United States v. Yellow Cab Company*, 332 U.S. 218; *United States v. du Pont & Co.*, 353 U.S. 586; *International Boxing Club v. United States*, 358 U.S. 242.

QUESTION PRESENTED

Whether sellers of fluid milk who have engaged in prima facie unlawful price discrimination in favor of all chain stores and against all independents, regardless of the volume of their individual purchases, can justify the discriminations as making "only due allowance for differences in the cost of * * * sale, or delivery resulting from the differing methods or quantities" in which the milk is sold or delivered to the chains and the independents, merely by proving that sales to all chains are less costly *on the average* than sales to all independents, without showing any justification for treating the chains and independents as separate classes of purchasers.[1]

STATUTE INVOLVED

The pertinent provisions of Sections 2(a), 2(b), and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended, 49 Stat. 1526; 38 Stat. 736, as amended, 62 Stat. 909 (15 U.S.C. 13(a), 13(b), and 25), commonly known as the Clayton Act, are as follows:

> SEC. 2(a). It shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like

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[1] The government does not continue to raise the issue, included in its notice of appeal, of the legality of appellees' price discriminations to restaurants.

grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

SEC. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *.

SEC. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing a government civil antitrust suit which charged the two largest dairies in the Chi-

cago, Illinois, area with illegal price discrimination, in violation of Section 2(a) of the Clayton Act. The district court found that the appellees' prices were discriminatory and constituted "prima facie violations of Section 2(a)" (App., *infra*, p. 27). It ruled, however, that the companies had established that such discriminations were justified by differences in cost under the proviso to Section 2(a) which permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [different] purchasers sold or delivered."

1. THE PRIOR PROCEEDINGS

The complaint in this case, filed in 1951, charged the defendants with violating Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act. In 1953, the district court dismissed the complaint after the government had presented its case. It held that the Sherman Act violations charged had not been proved; and that, although there was proof of price discriminations constituting prima facie violations of the Clayton Act, no injunctive relief was necessary because there was an outstanding injunction in a private antitrust suit which enjoined the defendants from engaging in such discriminatory practices. *United States* v. *Borden Co.,* 111 F. Supp. 562 (N.D. Ill.).

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed the dismissal of the Clayton Act charges. *United States* v. *Borden*

Co., 347 U.S. 514. It held (p. 520) that "the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree," and remanded the case for further proceedings.

On remand, the government's proof was limited to evidence that, subsequent to the entry of the decree in the private case, the appellees Bowman Dairy Company ("Bowman") and The Borden Company ("Borden") had discriminated in price in selling fluid milk in the Chicago area. The case was presented on the basis of stipulated facts, the depositions of expert witnesses, and written briefs. No testimony was taken.

The undisputed evidence established the following facts:

Bowman and Borden are two large dairy companies operating in the Chicago area. The wholesale customers of Bowman and Borden include large grocery chains, and "independent" stores which, for the most part, are singly owned. Fresh fluid milk is sold and delivered daily by Bowman and Borden to both chain and independent stores. The milk is delivered by trucks on mixed routes, *i.e.,* milk is delivered daily to both chain and independent stores from the same trucks, on the same routes, and by the same drivers. (Supplemental Pretrial Order, dated November 4, 1955 [Bowman]; Supplemental Pretrial Order, dated November 8, 1955 [Borden]).

Bowman and Borden have each adopted pricing systems for fluid milk products based upon the classi-

fication of all grocery stores as either "chains" or "independents." Under both systems chain stores receive a fixed discount, regardless of quantities purchased; independent stores receive discounts dependent upon the volume of their purchases, but in no event as high as that granted the chains. Thus, during the period from June 1954 to August 1955, Bowman granted the chains (A & P and Kroger) a flat 11 percent discount from fluid milk list prices, regardless of quantities purchased; it granted the independents a sliding scale of discounts based on the quantities ("points") purchased,[2] with a maximum discount of 8 percent (Supplemental Pretrial Order, dated November 4, 1955 [Bowman]). During the same period, Borden gave the chains (A & P and Jewel) a flat 8½ percent discount off list, while grouping the independents into four categories which, depending on volume, received no discount or discounts of 2, 3, or 4 percent, respectively (Supplemental Pretrial Order, dated November 8, 1955 [Borden]).

Under these price systems, all the independent customers of both Bowman and Borden necessarily paid substantially higher net prices than the chains, regardless of the volume of the independents' purchases or the methods by which Bowman or Borden sold or delivered the products to them.

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[2] In the dairy industry, it is customary for quantities to be expressed in "points." Thus, one quart of milk equals one "point"; one gallon of milk equals four "points"; one quart of cream equals four "points", etc. Both the Bowman and the Borden discount systems based the independents' discounts on the average daily points purchased each month.

2. THE COST STUDIES

The principal defense offered by Bowman and Borden was that the price discriminations in favor of the chains were justified by lower costs of selling and delivering to them.[3] In support of this claim, each company presented an elaborate cost study, which admittedly had been prepared for the trial. No evidence was offered to show what part, if any, of the cost data reflected in these studies had been considered by the appellees' officials when the price systems were adopted.

The Bowman cost study.—Bowman based its study upon an alleged distinction in the methods of sale and delivery as between the chains and the independents. In its cost allocation, it charged the independent stores as a group (but not the chains) approximately 24¢ per delivery for the collection of C.O.D. payments by its route drivers (Bowman Ex. 4, pp. 2–3, 13; Bowman Ex. 14, pp. 1–2, App. A, p. 1, schedules 2 and 3). It further charged the independents approximately six-tenths of a cent per point of milk delivered for various "customer services" allegedly performed by the drivers for the independent stores (but not the chains), such as delivering milk to the rear of the store, placing the milk in the refrigerator, assisting in arranging displays, etc. (Bowman Ex. 4, pp. 2–3, 7–8, 10, 13; Bowman Ex. 14, pp. 1–2, App. A, p. 1,

[3] Bowman and Borden also contended that the discriminations in price were not in interstate commerce, that their customers were not in competition with each other, and that the discriminations did not injure competition. The district court rejected these arguments (App., *infra*, pp. 26–27).

schedules 2 and 3). Bowman prepared charts setting forth, on the basis of these extra charges assessed against the independents, the alleged cost per point of delivering the same quantities of milk to chain and independent stores, at volume levels for a single delivery ranging from 10 to 1200 points of milk (Bowman Ex. 14, schedules 4 and 5). While the cost per point in both the independent and chain categories decreased with an increase in volume, it inevitably followed, in view of the extra charges to the independent stores, that the cost per point for delivering a given quantity of milk to an independent store was greater than delivering the same quantity of milk to a chain store (*ibid.*). Based upon these comparisons, the Bowman cost study concluded that the discount differentials at each volume level were "cost justified" (Bowman Ex. 14, pp. 1-3, 7, schedule 6).[4]

The Borden cost study.—Borden's study attempted to justify the discriminatory discounts by comparing the alleged total cost of delivering milk to all chain stores, whether owned by A & P or Jewel, with the alleged total cost of delivering milk to each of four

[4] New discount schedules which resulted in even greater discriminations in price between chain and independent store customers were made effective by Bowman in September 1955 and in January 1956. The supplemental cost studies offered in support of these new discounts (Bowman Exs. 15, 16) relied upon allegedly increased differences in delivery costs between chain and independent stores. These supplemental studies purported to calculate costs upon the basis of the same formulae used in the original study, and used the same number of delivery minutes at varying volumes to calculate costs of each delivery function. Bowman offered no explanation of why the cost of delivery to the independents (but not to the chains) had increased.

groups of independent stores, classified according to the volume requirements necessary to qualify the independents for each of the three discount brackets (Borden's Additional Pretrial order, dated September 19, 1957, pp. 60–170). (Independents in the lowest volume bracket received no discount.) Total weekly delivery costs were then allocated between the five classes of stores. From these allocations, Borden computed the alleged weekly cost, per $100 of sales, of delivering milk to each group of stores. Based on a comparison of the alleged cost per $100 of sales of delivering milk to the chain stores with the alleged cost per $100 of sales of delivering milk to each of the four groups of independent stores, the Borden study concluded that the discount differentials were cost-justified (Borden brief in opposition to post trial brief of the United States).

3. THE DECISION OF THE DISTRICT COURT

The district court held that the Bowman and Borden studies sustained the companies' claims that their discriminations in price—which "constitute prima facie violations of Section 2(a) of the Clayton Act" (App., *infra,* p. 27)—were cost-justified. Adopting "a liberal approach to cost justification studies" (*id.,* p. 28), the court found (*id.,* p. 35):

> * * * [D]efendants have each made a bona fide effort to allocate their costs between different types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost studies provide an adequate justification for

the differences in prices described above in defendants' published discount quotations.

Although the court recognized that "the studies are imperfect in some respects," it rejected the government's challenges to their validity, since "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect" (*id.*, p. 35). The court also overruled the government's attack on the studies because of their "seemingly arbitrary classification" of customers which "results in percentage discounts which do not bear a direct ratio to differences in volume of sales" (*id.*, p. 35). It stated (*ibid.*, emphasis in original) that "this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores." Finally, the court stated (*id.*, p. 37) that the government "is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as the Supreme Court has pointed out, a more appropriate tribunal to grant effective relief, if it be warranted."

THE QUESTION IS SUBSTANTIAL

1. This appeal presents an important question relating to the basis upon which discriminations in price, otherwise illegal under Section 2(a) of the Clayton Act, may be justified by evidence of alleged differences in cost under the proviso permitting "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in

which such commodities are to such purchasers sold or delivered * * *." The district court sustained, as cost-justified, a pricing system which, the court found, discriminated in favor of grocery chain stores at the expense of their independent competitors. The cost studies, upon the basis of which the price discriminations were upheld, treat the chains collectively and the independents collectively as separate purchasers. There is no showing, however, that there are common savings in cost applicable to all the chains that are not applicable to any of the independents; or that the allegedly common higher costs of serving the independents as a class are not applicable to any of the chains. The cost studies are thus inherently defective because there is no basis for treating the chains as one class of customers and the independents as another.

In the Robinson-Patman Amendments, "[t]he exception to price discriminations based on quantitative differences was limited to those making 'only due allowance for differences in * * * cost'" (*Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69). In order to justify a cost differential in favor of chain stores as against independents, therefore, a seller would have to show that there were in fact cost savings applicable to all the chains that were not applicable to any of the independents. As we show below, the appellees have made no such showing here.

The issue of the validity of cost studies based upon such an arbitrary categorization of customers is plainly substantial. The Robinson-Patman Amend-

ments stemmed from Congressional concern over the rapid growth of chain stores, particularly in the grocery field, and the ability of such chains to secure price and other concessions that were not available to the small independents. "The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43. The cost defense proviso was deemed "of great importance, for while it leaves trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery, wheresoever they may be employed in streams of production or distribution; it also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise, such differentials would become instruments of favor and privilege and weapons of competitive oppression." H.R. No. 2287, 74th Cong., 2d Sess. 9 (1936); see also 80 Cong. Rec. 9417 (1936).

The legislative purpose of limiting "quantity price differentials to the sphere of actual cost differences" would be thwarted if substantial price discriminations in favor of chain stores as against independents could be cost-justified on the basis here permitted. Neither Bowman nor Borden established any basis for treating the chains and independents as separate categories of customers. The district court, in nevertheless up-

holding the studies, concluded (App., *infra,* p. 35, emphasis in original) that the "seemingly arbitrary classification" between chains and independents "is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores"; and that although "the studies are imperfect in some respects," "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect." While such studies need not allocate costs with mathematical precision, they cannot be accepted unless they clearly establish that the discriminations in price reflect only actual differences in the cost of sale or delivery to different customers. Their validity is not established merely because they are "*not* wholly arbitrary," or because, as the district court also found (App., *infra,* p. 35), they represent a "bona fide effort" to allocate costs between different types of customers.

2. While the Bowman cost study contains a number of substantial errors in the allocation of costs between the chains and the independents,[5] its basic flaw runs

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[5] Thus, Bowman allocated all of the costs of its South Wholesale Division on the basis of the time spent by its deliverymen in delivering dairy products to its store customers (Bowman Ex. 14, p. 5, schedule 1). Since, according to the time studies conducted by Bowman, its deliverymen spent a substantial amount of time in performing "customer services" for and in collecting C.O.D. payments from independent stores (but not chain stores), this method of allocation charged a proportionately greater amount of the costs for the Division to the independents. But Bowman made no showing that these alleged differences in the direct costs of selling or delivering milk to independents and chains also provided a proper basis for allocating those other expenses of the Division which could properly be charged as an indirect cost of selling or delivering

far deeper. As indicated *supra,* pp. 7–8, the Bowman study is based upon a comparison of the alleged costs of delivery of varying volumes of its milk products to the chains and to the independents, respectively. The alleged difference between the costs of serving the two categories of customers rests upon the fact that the independents, but not the chains, have been charged for the costs of C.O.D. collections and for an assortment of so-called "customer services" inside the store. But Bowman made no effort to demonstrate that all of the independents operated on a C.O.D. basis or that each took all or even a portion of the customer services—services which Bowman itself had denominated as "optional" (Bowman Ex. 4, pp. 2–3; Ex. 14, p. 1). On the contrary, the record demonstrates that all independents did not operate on a C.O.D. basis (Bowman Ex. 4, p. 2; Ex. 14, p. 1), and that a large percentage of independents took none or substantially less than all of the optional "customer services" (Plaintiff's Rebuttal Pretrial Order as to Bowman, entered Dec. 16, 1958, Table 11). Thus, even assuming that no chain store availed itself of any of these services, and without considering the obvious de-

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milk. Moreover, the total cost of operation of the South Wholesale Division included many substantial expense items such as "plant depreciation," "utilities" and "milkroom wages" (*ibid.*), which had no relation to the different methods or quantities by which store customers purchased dairy products. Such expenses therefore should have been completely excluded from the study's cost base. Bowman conceded that, if the government were correct in its objection to this phase of its cost study, the district court could have found that its price differentials had not been fully cost justified. (Bowman Supplemental Pretrial Order dated December 23, 1957, p. 21.)

fect resulting from Bowman's failure to charge the chains with the costs incurred in handling their payments on a deferred basis, the basic fallacy of the Bowman study lies in its arbitrary classification of all of the independents into one group which assertedly had common costs greater than the common costs of serving the chains.

The inherently discriminatory nature of such a pricing system is apparent. Under a discount policy properly reflecting actual costs of sales and deliveries to individual purchasers, those independently owned supermarkets which Bowman serves in a manner similar to that by which it serves the chain stores and which purchase in volumes exceeding or approaching the average volume of a chain's stores,[6] should receive the same 11 percent discount that the chains enjoy, rather than the 8 percent figure which Bowman arbitrarily established as a maximum for the independents.[7] But, by the simple device of lumping all "independents" together and allocating to this artificial group the aggregate delivery and sales costs allegedly assignable to the independents as a whole, Bowman precludes any independent from ever competing on equal terms with the chain no matter how

[6] We assume *arguendo*, but do not concede, that the cost of serving a particular chain may properly be determined on the basis of the average cost of serving all stores in the chain, rather than the varying costs of serving particular stores.

[7] Bowman could, of course, set a limit on the discounts it would offer any purchasers, even though some might qualify for a higher discount. What it cannot do, but has done, is fix an 8% cut-off for discounts to independents as a class while granting a higher discount to the chains as a class.

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great its volume of purchases or how closely it approximates the chain's methods of operation.[8]

3. The Borden study, while superficially different from the Bowman study,[9] is subject to the same infirmities because it rests upon an arbitrary classification of customers according to ownership. The proper basis for classification, however, is, not ownership but differences in methods or quantities of sales

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[8] The record indicated that two independently owned supermarkets in Bowman's South Division during the period of the Bowman survey took an average of 650 points of milk per day, as contrasted with an average of 500 points for the Bowman chain stores (Rebuttal Pretrial Order as to Bowman, filed December 16, 1958, Tables 12–A, 12–B). As to at least one of these purchasers the Bowman cost justification was invalid on its face, even assuming that the special charges to independents were applicable to it and the other cost allocations appropriate (see Bowman Ex. 14, Schedules 4–6).

[9] Borden's cost study, like Bowman's was seriously deficient on its own terms. Thus, it substantially prejudiced the independent stores by its method of allocating indirect costs. These costs, including labor costs of many functions in the company's delivery route operations, the cost of owning and operating its delivery trucks, and nearly all of its branch office clerical salaries, accounted for over one-half of the total costs charged to Borden's independent store customers (Borden Additional Pretrial Order dated September 19, 1957). The Borden study allocated most of these indirect costs on the basis of the number of store locations and the remainder on the basis of the number of delivery stops made for customers in each discount category (*id.*, pp. 129, 142, 151). In other words, Borden allocated an equal share of these costs for each store location or delivery stop without regard to the volume of dairy products delivered or the amount of time required to make the delivery. This method of allocation was clearly erroneous. Indirect delivery costs and related clerical expenses are not incurred in equal amount for each store location or delivery stop but rather in proportion to those factors which limit the rate of use of the company's personnel and equipment, *e.g.*, volume of goods delivered or time required to make delivery.

or delivery that result in differences in costs. Thus, Borden treats the A & P and Jewel stores as if they were the same "purchaser", without any showing that their methods of operation are identical and that the stores of one of the two chains purchased the same average volume of milk as the other. But unless the two chain customers are in fact alike in these two respects, there is no basis for determining whether both chains are entitled to the largest discount (even assuming that one of them is), or whether the smaller chain is entitled to a larger discount than the largest independent.[10] More important, Borden lumped the independents into four groups which have no relation to the particular mode of operation of any one retailer[11] and which contain wide variations in the volume of purchases between the largest and smallest store in any category.[12] Thus, as with Bowman, the

[10] The Bowman study has the same defect.

[11] Borden, unlike Bowman, did not allocate all the costs for C.O.D. payments and customer services to the independents. It did, however, allocate most of such costs to them, and then aggregated the total costs of serving all members of the group of independents. Members of the group that did not take such services were thus necessarily given a higher cost basis than the actual cost of serving them.

[12] Thus, the class of independent customers entitled to a 4% discount included all stores receiving 150 points or more per day (Supplemental Pretrial Order as to Borden, dated November 8, 1955.) There were 80 such stores (Borden Additional Pretrial Order (Cost Study), Par. 202, p. 126) and they actually averaged about 231 points per day. (*id.*, Schedule XXXIV, p. 163). Moreover, many of these stores had a much higher volume. Thus the Schubert store had monthly deliveries of $4,083 (Supplemental Pretrial Order entered November 8, 1955, Schedule II) which, assuming a 24 day delivery month and a price of 20¢ per point, amounts to approximately 850 points per day. The average Borden chain store, however, took only

large independent supermarkets have been prejudiced in their competition with the chains by being forced to assume a share of the costs of sales or deliveries to other independent stores operating in a different manner but nonetheless placed in their "class."

4. There may be real cost savings in making volume deliveries to purchasers. Similarly, a milk distributor is not precluded from charging retailers, either by way of flat fees or lower discounts, for special services in connection with milk deliveries which utilize the driver's time, provided that the retailer is aware that these services enter into the rate structure and is afforded an opportunity to accept or reject them. The cost studies submitted by Bowman and Borden might very well indicate that differential pricing systems other than those actually adopted by the appellees could be cost-justified. But the studies do not justify the discriminations based upon a wholly arbitrary distinction between "chains" and "independents", which precludes any independent from ever achieving or approximating the discount automatically accorded all chains, regardless of the volume of its individual purchases or the methods by which sales or deliveries are made.

CONCLUSION

This appeal presents a substantial question as to the basis upon which cost justification of price discriminations may be established under Section 2(a) of the Clayton Act. This Court has not directly

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about 600 points per day (see Borden Additional Pretrial Order (Cost Study), Par. 202, p. 126, schedule XXXIV, p. 163).

passed upon the cost justification provision,[13] and the question is recurring and of public importance.[14] Probable jurisdiction should be noted.[15]

Respectfully submitted.

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SEPTEMBER 1961.

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[13] Although the cost justification defense was not directly involved in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, the Court discussed the provision (pp. 67–71).

[14] Most of the litigation involving the cost justification defense has been before the Federal Trade Commission. It has also been involved in three private antitrust actions—none of which involved the present problem. See *Bruce's Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985 (S.D. Fla.), affirmed, 187 F. 2d 919 (C.A. 5); *Russellville Canning Co.* v. *American Can Co.*, 87 F. Supp. 484 (W.D. Ark.), reversed, 191 F. 2d 38 (C.A. 8); *Reid* v. *Harper & Bros.*, 235 F. 2d 420 (C.A. 2).

[15] To whatever extent the district court's decision rests on its view that the Federal Trade Commission is "a more appropriate tribunal to grant effective relief, if it be warranted" (App., *infra*, p. 37), that ground is clearly erroneous. For the Clayton Act provides a "dual system of enforcement" (*Standard Oil Co.* v. *United States*, 337 U.S. 293, 310, n. 13), under which Congress has "explicitly provided" for "concurrent jurisdiction" in the courts and the Commission (*United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 208).

APPENDIX

In the United States District Court, Northern District of Illinois, Eastern Division

No. 51C947

[Entered February 27, 1961]

UNITED STATES OF AMERICA, PLAINTIFF

v.

BORDEN COMPANY, ET AL., DEFENDANTS

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

CAMPBELL, *Chief Judge:* This suit began in June, 1951 by the filing of a complaint charging eight Chicago dairies with various violations of Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton Act (Title 15 U.S.C., Sections 1, 2, 13(a)). Before the taking of any evidence, four of the eight defendants entered into a consent decree prohibiting the various practices which the Government sought to enjoin. The remaining defendants are the Borden Company and a wholly-owned subsidiary (hereinafter collectively referred to as Borden); and Bowman Dairy Company and a wholly-owned subsidiary (hereinafter collectively referred to as Bowman).

Since my conclusions rest in some measure upon differences between those practices alleged in the complaint and those practices alleged by plaintiff to exist in the milk industry in Chicago today, it is important to review those portions of the complaint which deal with alleged violations of the Clayton Act. The com-

plaint is twenty-three pages long, and, apart from its prayer for relief, consists of forty-eight paragraphs, only two of which are devoted to the Clayton Act charges, and read as follows:

> B. *Violations of Section 2(a) of the Clayton Act as Amended*
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> 46. Beginning on or about January, 1941, and continuing up to the date of the filing of this complaint, each of the defendants has sold and is continuing to sell for resale fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between said purchasers of fluid milk of like grade and quality, and the effect of such discrimination may have been and may continue to be to substantially lessen competition or tend to create a monopoly in the sale of fluid milk to wholesale purchasers in the Chicago area or to injure, destroy or prevent competition between the aforesaid wholesale purchasers knowingly receiving the benefit of such price discriminations and other wholesale customers not receiving the benefit of such discriminations, in violation of Section 2(a) of the Clayton Act, as amended (38 Stat. 730, 49 Stat. 1526, 15 U.S.C. Sec. 13(a). The defendants are continuing, threatening to continue, and will continue the aforesaid offenses unless the relief hereinafter prayed for is granted.
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> 47. The aforesaid discriminations in price have been granted, often secretly, in the form of preferential prices, discounts, rebates, lump sum cash payments, installment cash sums, and interest-free loans.

The length of the allegations respecting Clayton Act violations fairly indicates the importance which the plaintiff attached to those violations at the 1953 trial, and the amount of time devoted to proof of those alle-

gations, as compared to the magnitude and complexity of the plaintiff's alleged Sherman Act case.

At the close of plaintiff's case in 1953, I dismissed the entire complaint *U.S.* v. *Borden Co.,* 111 F. Supp. 562, holding, first with respect to the Sherman Act, that plaintiff had failed to show either monopoly or a conspiracy to monopolize and, second, with respect to the Clayton Act that (even though plaintiff had established a prima facie case) the defendants were effectively prohibited from committing further violations by the terms of a decree entered by another judge of this Court. *Dean Milk Company* v. *American Processing and Sales Company,* No. 49 C 1159. I then stated, at 111 F. Supp. pages 581, 582:

> A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the Government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the Government's prayer for injunctive relief, insofar as the Clayton Act is concerned.
>
> As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.

On appeal, the Supreme Court affirmed the Sherman Act phase of the case, but reversed and remanded as to the Clayton Act phase on the sole ground that the existence of a private decree does not *itself* deprive the Government of its right to a decree when

the need for injunctive relief is shown. U.S. v. Borden Company, 347 U.S. 514. However, the Court further indicated that the *Dean* Decree is properly one of the many considerations involved in this determination:

> The Government contends that it has "an independent right to relief against violations of the Clayton Act, without regard to whether such violations previously have been enjoined by a decree in a private antitrust suit." But we cannot say that the existence of the private decree warrants no consideration by the chancellor in assessing the likelihood of recurring illegal activity. We hold only that, in view of the difference in the respective interests sought to be vindicated by the Government and the private litigant, the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree.
>
> The judgment of dismissal as to the Sherman Act allegations is affirmed; as to the Clayton Act allegations the case is remanded to the District Court for further consideration, and such further proceedings as may be necessary, in accordance with this opinion (347 U.S. 514, 520).

After remand, on the motion of plaintiff, on April 18, 1955, I opened the record for the introduction of further evidence by plaintiff for the purpose of showing the existence of current Clayton Act violations, and by the defendants for asserting affirmative defenses. All of the evidence was taken in the form of stipulations which were then embodied in pre-trial orders, and in the form of depositions of expert witnesses. Afterward, all parties argued their respective positions through able and comprehensive briefs.

I am grateful to counsel for all parties for their cooperation and assistance in preparing the lengthy pre-trial orders and the able briefs. Without such cooperation this case might have consumed many weeks of the Court's time.

The sole question now before me is the appropriateness of the requested injunctive relief—whether, in the light of *present* conditions in the milk industry in Chicago, as shown by the evidence presented to the Court after remand, the public interest would be served by the issuance of an injunction in the form prayed by plaintiff's complaint.

Those paragraphs of the complaint, quoted above, relating to the Clayton Act fairly describe the type of evidence which was introduced at the 1953 trial. Plaintiff then showed that defendants had engaged in "stop-buying," that is, the "purchasing" of wholesale outlets. Plaintiff also showed that defendants had made interest-free loans to wholesale customers and granted discriminatory discounts to various customers either outright, or through gifts of fixtures or merchandise.

These practices, described in the complaint and shown at the 1953 trial, were not referred to after remand of the case. Indeed, there is no evidence of any kind to support a finding that any such practices exist today in the milk industry in Chicago. The practice to which the evidence before me relates, as shown by the stipulations of fact prepared after remand, consist of price discriminations which may be summarized as follows:

> 1. Bowman published and followed, during the years following the remand, discount quotations which on their face discriminated between chain customers and independent stores. For example, from June, 1954 to August, 1955, the

published Bowman discount quotations were as follows:

To chain customers (A & P and Kroger): 11 per cent off of the fluid milk list prices regardless of quantities purchased.

To independent stores: A sliding scale quantity discount with a maximum of 8 per cent off of the fluid milk list prices computed on the basis of the average daily "points" purchased each month.

Plaintiff has demonstrated by its Schedule I, comparing five grocery stores, chain and independent, within a radius of one mile and served by the same milk route, and by its Schedule II, comparing four stores, chain and independent, within another radius of one mile and served by the same milk route, that a price discrimination exists as against the independent stores under applicable discount quotations.

2. With respect to Borden, plaintiff's evidence as embodied in the stipulations also shows price discrimination between chain and independents by means of published discount schedules. For example, from June, 1954 until August, 1955, the following discount quotations were in effect:

To chain stores (A & P and Jewel): 8½ per cent off of the fluid milk list prices regardless of quantities purchased.

To independents: A graduated quantity discount with a maximum of 4 per cent off of fluid milk list prices computed on the basis of average daily "points" purchased each month. Again, by schedules relating to chain and independent stores within a radius of one mile and served by the same milk route, plaintiff has demonstrated a price discrimination as against independents under applicable discount quotations.

Plaintiff has made similar charges of price discrimination respecting the "bulk wholesale customers" of

defendants. This class of customers includes, principally, restaurants and hotels. By tables comparing the flat, net prices on customer purchases in the downtown area of Chicago, Illinois, plaintiff has demonstrated with regard to both defendants price differences among their bulk wholesale customers.

With regard to both classes of customers, plaintiff, in order to show prima facie violations of Section 2 (a) of the Clayton Act, must prove that:

> 1. Defendants were engaged in commerce, and that discriminatory practices occurred "in the course of such commerce";
> 2. Defendants either directly or indirectly discriminated in price between purchasers of commodities of like grade and quality;
> 3. That the effect of such discrimination "may be" to substantially lessen competition or to create a monopoly in this line of commerce, or to injure, destroy, or prevent competition with any person who grants such discrimination, or with customers of such person.

It is not open to question that the price differences described above are not price discriminations under Section 2(a) in light of *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536. However, defendants argue that these discriminations are not prima facie violations of Section 2(a) on the basis of these reasons:

> 1. Defendants contend that plaintiff failed to prove that the alleged violations were committed in the course of interstate commerce. A similar contention was before me prior to the 1953 trial upon the motion of defendants. After extensive argument and due deliberation, I rejected the contention and denied defendants' motion. On appeal, this contention was neither pressed by defendants nor considered by the Supreme Court. I have, however, again fully considered the evidence before me

and find that defendants' alleged violations with regard to wholesale and bulk wholesale customers did occur in interstate commerce.

2. Defendants contend that the Government has failed to show that there has been any injury to competition. This argument is wholly without merit in view of the well-settled principle that the Clayton Act frowns upon any discrimination which "may" injure competition. *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37; *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152, 154. I note here the interesting analysis of the requirement of injury to competition by the Seventh Circuit Court of Appeals in the recent decision of *Anheuser-Busch Inc.*, v. *F.T.C.*, —— F. 2d ——, decided upon remand from the Supreme Court. Since that case differs factually from the cause now before me, I do not here find it relevant.

In short, the evidence shows: That the sales made by defendants were in commerce; that the defendants discriminated in price; that the customers of defendants were in competition with each other, and that there may be an injury to competition. I find that the published discount quotations of defendants, which on their face show discriminations between the defendants' wholesale customers, constitute prima facie violations of Section 2(a) of the Clayton Act. I further find that the discriminations between defendants' bulk wholesale customers constitute prima facie violations of Section 2(a) of the Clayton Act.

As I indicated previously, there are many factors which affect a determination of this case. Most important is the defense of cost justification raised by the defendants in accordance with the cost proviso of Section 2(a) which reads as follows:

> *Provided*, That nothing * * * (herein) contained shall prevent differentials which make

> only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

Though there has been some disagreement as to whether this provision should be strictly construed so as to require full cost justification of every price differential with mathematical certainly, or whether the provision should be liberally construed so as to allow a reasonable latitude in cost studies, I find that a liberal approach to cost justification studies is today supported by expert, as well as judicial, opinion.

The Supreme Court in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61 commented specifically at Page 68 upon the "intricacies inherent in the attempt to show costs in a Robinson-Patman proceeding" and the "elusiveness of cost data." The Federal Trade Commission in *In the Matter of Minneapolis-Honeywell Regulator*, 44 F.T.C. 351, stated at Page 394:

> Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error.
>
> * * * * *
>
> Where they (cost studies) are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. * * * Respondent's burden under the Act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error.

In *American Can Co.,* v. *Russellville Canning Co.,* 191 F. 2d 38, the Court, finding that the district court "applied too rigid a standard," stated at Page 59:

> If a manufacturer granting quantity discounts is required to establish and to continuously maintain a cost accounting system which will record the expenses incurred in selling every individual customer and all of the data which the plaintiff deems essential, the burden, expense and assumption of risk involved would seem to preclude the granting of quantity discounts, at least until the approval of the plan by the Federal Trade Commission had been secured.
>
> We cannot say that the District Court was compelled to accept the defendant's justification of the quantity discounts which were granted. If, however, the system was adopted in good faith and the cost study during the test period of more than four years was honestly maintained, and reflected with substantial accuracy the differences in selling costs as between the customers in Class C and those in Classes A and B, we think the court's conclusion that the justification was inadequate because it was not continued beyond the test period, did not reflect cost differences as between individual customers, and failed to take into consideration conjectural geographical differences in selling costs and other matters which might be thought to have some speculative bearing on such cost differences, was not justified.

In *Reid* v. *Harper and Brothers,* 235 F. 2d 420, the Court made the following statements at Page 422:

> Both the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data derived from litigation-inspired accounting methods.

> To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyers, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such a requirement might be to discourage all price differentials, even those actually justified by cost distinctions.

In addition, the Report to the Federal Trade Commission by the Advisory Committee on Cost Justification under the Robinson-Patman Price Discrimination Act, filed February, 1956, and the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws concur in supporting a liberal approach to cost justification studies. The Report of the Attorney General's Committee contains the following statements at Pages 174, 175:

> As a legal framework, we recommend recognition that a Robinson-Patman cost defense is not susceptible to testing by precise or mechanical rules. We advise a liberal interpretation of the statute's "due allowance" criterion as enacting a reasonable de minimis concept to exonerate a challenged price even if an attempted cost defense falls short of "justifying" it by a fractional amount. Similarly, realistic adaptation of this concept should validate only partially "justified" price concessions whenever the "unjustified" portion of the differential alone could not reasonably cause "injury" sufficient to bring the Act into play * * *.
>
> Because any accounting apportionment of costs essentially involves subjective business judgment, not objective fact, we recommend that a reasonable approximation of production or distribution cost variances to prior differentials—when demonstrated in good faith through any authoritative and sound accounting principles—suffice as a matter of law to meet the requirement for justification under the Section

> 2(a) cost proviso. Applied in this way, the Act should impede no price variation reasonably related to economies in any of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions.

The Cost Justification Report at Page 6 expressly recognizes the "necessity for a broad approach in the administration of the cost proviso" and in discussing the meaning of the words "due allowance" as contained in the cost proviso, comments at Page 9 as follows:

> Believing that it was the legislative intent to permit sellers to pass on to customers the benefit of economies in manufacturing and distribution, the Committee feels that the correct interpretation of this phrase is of prime importance.
>
> In view of the plus-or-minus leeway which must be granted to all cost figures, as discussed later (Section III, A, 1), "due allowance" should not be construed in every case to require full and complete cost justification of a price differential. It should be construed flexibly, so as to require only "reasonable allowance" for costs essentially involves subjective business pricing principles.

At Page 11, the Report states:

> Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. "Great weight" should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound. A mere showing that a method other than that used by the respond-

> ent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent.

And at Page 22, the Report concludes:

> The Committee recognized that the cost proviso of the Robinson-Patman Act operates in a complex area and that many of the problems to which it gives rise are not given to ready solution. Nevertheless, its significance as a means of lawfully reflecting economies of operation in lower prices to the benefit of the consuming public is apparent and every effort must be made to implement its important economic role.

Plaintiff contends that the case of *F.T.C.* v. *Simplicity Pattern Co., Inc.,* 360 U.S. 55, dictates that the cost proviso of Section 2(a) must be narrowly construed. However, I find that that opinion, resting solely upon the court's interpretation of Section 2(e) of the Act, is not pertinent here.

I might add here that it is my opinion that the Federal Trade Commission, in matters of accounting detail, is the tribunal possessing *expertise*. I am completely in accord with the suggestion made by the *Supreme Court in Bruce's Juices* v. *American Can Co.,* 330 U.S. 743 at Page 745:

> It (The Robinson-Patman Act) indicates, too, that the Federal Trade Commission is the appropriate tribunal to hear in the first instance the complicated issues growing out of grievances against a quantity discount practice of a seller.

The above statements of the Courts, the Federal Trade Commission Report and the Report of the Attorney General's Committee, set forth the principles which guide my decision as to the cost justification phase of this case.

I now consider the cost studies submitted by defendants to sustain their cost justification defenses:

1. *Bowman Studies.*—Bowman first maintains, and has attempted to show by studies, that plaintiff has engaged in a careful process of culling and grading of some 2,300 stores available for consideration by plaintiff in the Chicago area in order to show a discrimination among wholesale customers. Bowman contends this "culling and grading" process results in isolated examples of discrimination which are not representative of the situation throughout the Chicago area. Bowman has also submitted several cost studies conducted and analyzed primarily by Albert J. Bergfeld, an expert in the field, which purport to justify the different discounts granted to chains and independents. These studies, which are lengthy and detailed, conclude that the discount quotations are justified because of the difference in the cost of delivery between chain and independent stores.

With regard to the alleged price discriminations against bulk wholesale customers, Bowman contends that the price variations complained of were bona fide attempts to meet competition and were also justified by differences in delivery costs and has submitted a detailed cost study to this effect.

2. *Borden Study.*—The Borden study conducted by J. F. Malone, an expert in the field, assisted by the accounting firm of Haskins and Sells, is a detailed analysis of route activities, branch office clerical activities and district central office activities and concludes in substance that the price discrimination against independent wholesale customers is justified by a consideration of direct and indirect costs. With regard to the alleged price discriminations against bulk wholesale customers, Borden contends that the price variations complained of were justified by differences in manufacturing

costs due to differences in quantities of various products purchased and has submitted summary schedules to this effect.

The defendants have as well submitted by their briefs, a mass of material, much of which is argumentative, explaining and elaborating upon specific parts of the studies. For purpose of this memorandum it is sufficient to find, as I do, that the studies of both Bowman and Borden are products of extensive investigations of many customers within given areas and reflect the bona fide efforts of these defendants to determine differences in cost between various classes of their customers.

Plaintiff has made detailed criticisms of defendants' wholesale customer cost studies. Among other contentions, plaintiff argues: That defendants have given too broad an interpretation to the phrase "methods or quantities" as used in the cost proviso in preparing their cost studies; that defendants' own cost charts show that the discount differences between their store customers were not justified by cost differences; that Bowman cannot justify its discriminatory prices on the basis of any alleged cost differences resulting from the collection of C.O.D. payments or the rendering of "customer services" in connection with its milk deliveries; that Bowman and Borden "customer services" are prohibited by Sections 2(d) and 2(e) of the Clayton Act and outside the scope of Section 2(a); that the Bowman and Borden systems of cost allocations are unsound and improper on several grounds including the use of erroneous premises, statistically unsound standard time formulae and wrongful classification of various functions. Plaintiff has, as well, by Tables, submitted corrections of these alleged deficiencies in defendants' cost allocations.

Another principal criticism of the cost studies relates to their seemingly arbitrary nature. A customer who qualifies as a chain, for example, gets a flat discount regardless of volume purchased, while a customer who qualifies as an independent must reach a prescribed dollar volume in order to qualify for his discount.

Plaintiff has selected some isolated cases where this seemingly arbitrary classification results in percentage discounts which do not bear a direct ratio to differences in volume of sales. However, this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores. Some measure of business (or accounting) judgment must be used in determining the premises of a cost study, and I cannot now find that these defendants have determined premises for these studies which are improper. Certainly, the studies are imperfect in some respects, but any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect.

Plaintiff contends with regard to defendants' bulk wholesale customers that Bowman failed to prove a bona fide meeting of competition as to its customers and also failed to prove a cost justification defense. Plaintiff contends that Borden failed to prove its cost justification defense.

Having fully considered all the evidence before me, as well as the schedules, summaries and tables and arguments relating thereto of the parties, I find that defendants have each made a bona fide effort to allocate their costs between different types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost studies provide an adequate justification

for the difference in prices described above in defendants' published discount quotations.

I further find that defendants' bulk cost studies provide an adequate justification for the difference in price described above with regard to the flat, net prices charged defendants' bulk wholesale customers.

I now consider whether a decree should be granted in accordance with the Government's prayer for relief. In reaching a decision on this question I have been guided, among other considerations, by the following:

> 1. As stated at the outset of this memorandum, the practices described in the plaintiff's complaint apparently no longer are followed by the defendants. In any event, such practices would be relevant only to show the present state of the industry and to determine the likelihood of future violations occurring. As Mr. Justice Jackson stated in *U.S.* v. *Oregon Medical Society,* 343 U.S. 326, at Page 333: "All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form it is to undo existing conditions, because otherwise they are likely to continue. In a forward-looking action such as this, an examination of 'a great amount of archeology' is justified only when it illuminates or explains the present and predicts the shape of things to come." The types of violations now alleged to exist are completely different from those described in the original complaint. No evidence was presented and no argument made that there is a *present* need for injunctive relief to cure such old practices. Further, these old practices which were the subject of the 1953 trial have already been condemned

by the terms of the *Dean* Decree. As I have already indicated, and as the Supreme Court has commented in this case, I am justified in considering *all* factors, as well as the *Dean* Decree, in arriving at this determination.

2. The various practices of which plaintiff *now* complains, consisting of alleged outright discrimination between classes of customers, are shown to have been adequately justified by the defendants' cost studies.

3. The single question for determination in this phase of these proceedings is whether or not I should issue an injunction regulating *all* wholesale sales made by defendants. Such an injunction would, by its nature, be general and all inclusive. And, as the parties well know, in all probability, subsequent proceedings for enforcement, amendment and modification of the injunction would follow.

In short, I would regulate this particular phase of the industry and, in so doing, would continually be called upon to pass judgment on the pricing practices of these defendants. On the basis of the evidence presented, I feel that such a course is impractical and unwarranted.

I wish to make clear, however, that I have not given my stamp of approval to all pricing policies and practices revealed by the evidence. As I have indicated in other parts of this memorandum, these policies and practices have in many instances been imperfect.

Plaintiff is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as the Supreme Court has pointed out, a more appropriate tribunal to grant effective relief, if it be warranted.

Accordingly, keeping in mind the admonition of the United States Supreme Court in this very case that:

> (T)he moving party must satisfy the Court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive;

I find that plaintiff has shown no need for the exercise of the Court's equitable powers and accordingly, the case must be, and is, hereby dismissed.

I adopt as my Findings of Fact the Stipulations of Fact embodied in the pre-trial orders heretofore entered by me.

Further, in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, the facts and conclusions stated in this memorandum shall stand as additional findings of fact and conclusions of law.

(S) CAMPBELL,
Chief Judge.

Dated Feb. 27, 1961.

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